

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**MELISSA McGAW,**

**Appellant,**

**v.**

**ANGELA McGAW,**

**Respondent.**

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DOCKET NUMBER WD77799  
**August 18, 2015**

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Appeal from:  
Clay County Circuit Court  
The Honorable Kathryn E. Davis, Judge

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Appellate Judges:  
Division Four: Alok Ahuja, C.J., Presiding, Lisa White Hardwick, J. and Robert Clayton, Sp. J.

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Attorneys:  
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appellant  
Kimberly S. Humphrey, Gladstone, MO for respondent; Anthony E. Rothert, St. Louis and  
Rebecca J. Martin, Kansas City, MO, for Amicus Curiae

# MISSOURI APPELLATE COURT OPINION SUMMARY

## COURT OF APPEALS -- WESTERN DISTRICT

**MELISSA McGAW**

**Appellant,**

**v.**

**ANGELA McGAW,**

**Respondent.**

WD77799

Clay County

Affirmed/Denied: AFFIRMED

Taking the facts alleged by Melissa McGaw as true, she and Angela McGaw started dating in 1995. The couple eventually had a commitment ceremony in Kansas City, and Angela legally changed her last name to McGaw. The pair bought a home together and decided to have children.

In 2004, Angela gave birth to twins in Kansas City. The children were conceived using sperm from an anonymous donor jointly selected by Melissa and Angela. From 2004 to 2007, Angela and Melissa raised the children together as co-parents.

Angela and Melissa separated in January 2007, and Melissa moved out of the shared household. She and Angela agreed to a schedule for visitation with the children, and a division of property, through mediation. Although separated, Melissa and Angela continued to share expenses for the children and to follow a visitation schedule until June 2013. At that time, Angela stopped allowing Melissa to see the children.

Melissa filed a Motion to Determine Parent-Child Relationship seeking to determine parent-child relationship, custody, and visitation pursuant to § 210.826, RSMo. Angela filed an answer and motion to dismiss, arguing that Melissa had no biological relationship to the children and therefore lacked standing to assert her claims, and that Melissa's pleading failed to state a claim for relief.

In her suggestions in opposition to Angela's motion to dismiss, Melissa argued that she had standing under Missouri's version of the Uniform Parentage Act ("MoUPA"), §§ 210.817 – 210.854, RSMo, and that she had standing under common-law equitable doctrines defining parentage.

A commissioner recommended that the action be dismissed on the basis that Melissa lacked standing and failed to state a claim upon which relief could be granted. A circuit court judge adopted the commissioner's findings and recommendations and entered judgment dismissing Melissa's motion without prejudice.

AFFIRMED

**Division Four Majority Opinion holds:**

On appeal, Melissa does not challenge the circuit court's dismissal of her claim to have her parentage established under the MoUPA. Instead, she argues that she stated a claim for relief based on theories of breach of contract, or under common-law equitable doctrines. We conclude that none of Melissa's theories justifies reversal.

In her first Point, Melissa argues that the circuit court erred in dismissing her motion because she stated a claim to enforce a voluntary agreement between her and Angela governing visitation. Our prior decision in *White v. White*, 293 S.W.3d 1 (Mo. App. W.D. 2009), which involved similar circumstances, guides our resolution of many of Melissa's claims.

As in *White*, Melissa's motion failed to adequately plead a breach of contract theory, as the motion is silent as to the terms of the separation agreement as they relate to visitation, or as to what the parties' set visitation schedule was. Moreover, the prayer of Melissa's motion did not seek to enforce any pre-existing agreement between the parties. Also, as in *White*, she did not argue that she had stated a claim for breach of an express agreement in opposition to Angela's motion to dismiss.

In her second Point, Melissa argues that she has standing to seek custody or visitation under the doctrines of *in loco parentis* or equitable parentage. *White* refused to adopt either the *in loco parentis* or equitable parentage theories in similar circumstances. *White* concluded that § 453.400, RSMo, expressed the outer limits of the *in loco parentis* doctrine, and would not grant standing after a couple separated. Unless and until it is overruled, we are bound to follow *White* under principles of *stare decisis*.

As for an equitable parentage claim, *White* rejected the application of that theory in similar circumstances. Also, an equitable remedy is not necessary because Melissa has an available statutory remedy under § 452.375.5(5), RSMo. *White* rejected the claim that an appellant in similar circumstances could obtain a determination of child custody and visitation under § 452.375.5(5), but subsequent to *White*, the Missouri Supreme Court decided *In re T.Q.L.*, 386 S.W.3d 135 (Mo. banc 2012), which overruled *White*'s construction of § 452.375.5(5) and recognized that § 452.375.5(5) provides a basis for a non-biological parent to commence an action seeking child custody and visitation.

In her third Point, Melissa claims that Angela is equitably estopped from denying the parent and child relationship between Melissa and the children. Melissa acknowledges that the *White* decision determined that equitable estoppel would not provide the standing needed to seek a declaration of maternity, custody, or support. Melissa argues that she has standing to bring a

breach of contract action to enforce the custody agreement and, independently, she has standing to bring an action as an equitable parent or person *in loco parentis*. As we reject her equitable parentage and *in loco parentis* arguments, and conclude that she failed to adequately plead a claim to enforce any custody agreement, these arguments are unpersuasive.

Before: Division Four: Alok Ahuja, C.J., Presiding, Lisa White Hardwick, J. and Robert Clayton, Sp. J.

Majority Opinion by: Alok Ahuja, Chief Judge

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Division Four Concurring in Part and Dissenting in Part Opinion States:

While Judge Clayton agrees with the majority that Melissa McGaw has a right to proceed in an independent action under § 452.375.5(5) to seek third-party custody or visitation, he would remand the present case to the circuit court to enable Melissa McGaw to obtain a full hearing on the merits of that claim. In addition, Judge Clayton argues that in light of the United States Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which recognized the constitutional right of same-sex couples to marry as well as related constitutional rights, this case should be transferred to the Missouri Supreme Court to determine whether, post-*Obergefell*, an equitable parentage theory should be adopted in cases like this one.

Concurring and Dissenting Opinion by: Robert M. Clayton, III

August 18, 2015

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